HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

ASHER BADARI
First Appellant

RICANE GALAMINDA
Second Appellant

LOFTY NADJAMERREK
Third Appellant

CARMELENA TILMOUTH
Fourth Appellant

and

MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING
First Respondent

MINISTER FOR HOUSING AND HOMELANDS
Second Respondent

RESPONDENTS' SUBMISSIONS (FIRST TO THIRD DETERMINATIONS)

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2 The Minister exercised the power under s 23 of the *Housing Act 1982* (NT) on four relevant occasions. The appeal proceeding (D7/2025) concerns the validity of the determinations resulting from the first three exercises of that power (**First to Third Determinations**). Two questions arise: (1) before exercising the power, was the Minister obliged to provide any of the Appellants with an opportunity to be heard?; (2) was the Minister's exercise of power unreasonable? The answer to both questions is "no".

PART III: SECTION 78B NOTICE

3 Notice under s 78B of the *Judiciary Act 1903* (Cth) is unnecessary.

PART IV: MATERIAL FACTS

4 The "general factual background" is not in dispute: see **CAB 70-75 [11]**. The Appellants' factual narrative (**AS [4]-[20]**) generally accords with that summary, but there are a number of matters that require elaboration, clarification or correction.

A PREVIOUS AND NEW POLICY FRAMEWORKS

5 Throughout the Appellants' submissions, there are various references to the amount of "rent" of each of the Appellants. It is necessary to approach those references with a proper appreciation for what those amounts represent.[1] In particular, it is necessary to recognise there existed under the previous policy framework (**Previous Framework**) a distinction between the amount of "rent" a person was legally liable to pay per week (**full rent**) and the amount the person, in practice, paid per week (**reduced rent**). That distinction continues to exist under the current policy framework (**New Framework**).

6 Under both frameworks, the distinction is made possible by reg 5 of the *Housing Regulations 1983* (NT), which provides that the Chief Executive Officer (Housing) (**CEOH**) "may, in its discretion, grant a rebate of the whole of the rent payable in respect of a dwelling by an eligible person, or of such portion of that rent as it thinks fit, and for such period as it thinks fit". In practice, where that power was exercised, any "rebate" amount was offset against the "full

[1] It is also important to note that they are largely drawn from the Appellants' aide-memoire at **ABFM 390**, which was not evidence. The summary of the exchange in **AS [19] n 14** as to the Respondents' position on that document is incomplete: that position was "[s]ubject to rebates taking effect under regulation": see **RBFM 456**. The Respondents' competing aide-memoire is at **RBFM 457**.

rent" amount such that, in fact, the CEOH only required the person to pay the "reduced rent" amount.[2]

A.1 Previous Framework

7 Before the making of the First Determination, the "Remote Public Housing Rent Framework" governed rent payments for remote public housing.[3] The amount of "full rent" for a dwelling was fixed by reference to maximum amounts identified in the "Maximum Rent Policy".[4] That arrangement was implemented on a tenant-by-tenant basis, under tenancy agreements governed by the *Residential Tenancies Act 1999* (NT) (**RT Act**). Tenants could, however, apply for a "rebate" under r 5 of the Housing Regulations. The exercise of that discretion was
10 informed by the "**Rental Rebate Policy**".[5] In short, if the discretion was exercised in accordance with that policy, a tenant received a "rebate" of an amount that meant, in fact, they would pay "reduced rent" in an amount fixed at a percentage of assessable household income.[6]

A.2 Development of New Framework

8 Over time, the Previous Framework "was considered to be inefficient, complex and difficult to administer. As household income frequently changed for tenants in remote public housing, due to factors such as changes in Centrelink entitlements and changes to the number of persons occupying a dwelling, the rent payable by the tenant required frequent reassessment and was subject to change": **CAB 15-16 [16]**. In that context, in around March 2018, Cabinet requested the relevant Department to develop policy options to reform the Previous Framework.[7]

20 9 As part of the development, the "Stakeholder Advisory Group" (**SAG**) was formed, "constituted by representatives from 13 peak bodies in Northern Territory Aboriginal land, housing, justice and medical services": **CAB 124 [90]**. The SAG was to "[w]ork with the Department to assist in designing options to be considered in the development of the new remote public housing rent framework", including by "[p]roviding advice on potential impacts to tenants and occupants of any proposed options"; "[c]ommenting on discussion papers and

2 That practice is amply demonstrated by the transaction records for the dwelling of Mr Badarai and Ms Galaminda (BAW-36: (**RBFM 255-270**), and the dwelling of Mr Nadjamerrek: see BAW-44: (**RBFM 304-319**).
3 First Warren Affidavit at [8] (**RBFM 9-10**).
4 First Warren Affidavit at [9](b) (**RBFM 10**); BAW-1 (**RBFM 35-41**).
5 See Third Warren Affidavit at [5] (**RBFM 357-358**); BAW-54: (**RBFM 362-369**).
6 First Warren Affidavit at [9(d)]: (**RBFM 11**).
7 First Warren Affidavit at [8]: (**RBFM 9**).

providing advice on the advantages and disadvantages of the options being considered" and "[p]roviding cultural and/or remote community context to help inform the project.[8]

10 The SAG met four times between July and December 2018.[9] At a meeting held in September 2018, the SAG agreed that a "dwelling based" rent model was the "preferred option for a new remote rent framework" (compared to other models including "income based", "household based" and "individual levies").[10] At the next meeting in November 2018, the group was asked to nominate their "preferred" method for calculating rent under a "dwelling based" model,[11] and "[a]ll members agreed that the operational cost per bedroom model" was the "best" option.[12] That preferred option was intended to "defray the cost or providing remote public housing": **CAB 125 [90]**. It was preferred by SAG based "on consideration of affordability and transferability to the community housing sector", and the group "agreed that based on the data provided the rent under *discount operational cost per bedroom* model would be affordable for the majority of households".[13] Notably, the *actual* operational cost per bedroom was approximately $80 per bedroom.[14] The approximately $60 per bedroom amount was the "*discount* operational cost" and represented 75% of the actual operational cost, in "acknowledgement" that the actual operational cost per bedroom "may be higher than 25 per cent of current median income for some remote households".[15]

11 The policy continued to be developed by the Department between 2019 and 2021, which included consultation with other government departments, and engagement with the representatives of several organisations which were also members of the SAG.[16] In November 2021, some members of the SAG were briefed on updates to the development of the policy, including the proposal that a rate of $70 per bedroom would be used and that there would also

8 BAW-3 (**RBFM 49**).

9 First Warren Affidavit at [13] (**RBFM 13**).

10 BAW-6 (**RBFM 83**)

11 The four options were: (1) "factor principle approach"; (2) "operational cost approach – government employee housing" (GEH); (3) "operational cost approach – cost per bedroom"; (4) "replacement cost models": BAW-6: (**RBFM 78**).

12 BAW-6 (**RBFM 79**). The meeting record from November 2018 was endorsed at the subsequent meeting "and no changes were raised": BAW-7 (**RBFM 109**).

13 BAW-6 (**RBFM 79**) (emphasis added).

14 This amount was based on the cost or providing remote public housing, excluding capital. Those costs included council rates; repairs and maintenance costs (based on actual expenditure for 2017/2018); both direct staffing (eg, community housing officers, property managers) and indirect staffing (eg, management, finance, human resources) costs. The amount was noted to be an estimate only: BAW-6 (**RBFM 91**).

15 BAW-6 (**RBFM 85**).

16 First Warren Affidavit at [15] (**RBFM 13**).

be a "safety net, whereby rent is at most calculated at 25 per cent of household income to ensure tenants are not placed under rental stress".[17] No member of the SAG who attended the meeting objected to those developments.[18] The lack of objection is readily explicable: although there was an increase in the amount per bedroom, the amount remained less than the actual operational cost that had been estimated and, in addition, it was to be combined with a "safety net" overlay (which had not been part of the earlier proposal).

12 In December 2021, the Cabinet approved the policy model for the New Framework: **CAB 16-17 [17]; CAB 125 [91]**. That model had two core components: *first*, the power in s 23 of the Housing Act would be exercised by the relevant Minister (who was a member of Cabinet at the time) to determine the "full rent" payable by reference to the number of bedrooms contained in a dwelling; and, *second*, the **Safety Net Policy**. The Safety Net Policy was intended to allow the CEOH "to only charge a portion of the full rent payable by a tenant on a temporary basis, if the tenant would encounter rental stress due to being required to pay the full rent payable pursuant to the Determination": **CAB 17 [17]**.[19] More specifically, the Safety Net Policy was designed so that tenants in that position would be required "to pay an amount equivalent to 25% of the total household income of the relevant dwelling, initially for up to 6 months": **CAB 17 [17]**, see also **CAB 125 [91]**.[20] Regulation 5 of the Housing Regulations was available to implement that policy.[21]

A.3 Implementation of the New Framework

13 ***First Determination*:** Very shortly after Cabinet approved the model for the New Framework, the Minister made the First Determination.[22] That determination was designed to operate across two distinct periods: the **Interim Period** (commencing on the date of the instrument and concluding on 1 May 2022) and the **Final Period** (commencing on 2 May 2022). The determination operated for dwellings located in 103 different remote communities, including

17 BAW-8 (**RBFM 123**).

18 See First Warren Affidavit at [15] (**RBFM 14**).

19 The benchmark for a person being in rental stress is when "rent exceeded 25 percent of household income": **CAB 125 [91]**.

20 First Warren Affidavit at [17] (**RBFM 14-15**).

21 The Appellants contended that reg 5 of the Housing Regulations was invalid by reason of an inconsistency with s 23(4) of the Housing Act: **CAB 122-123 [86]**. The Court of Appeal did not deal with that issue and left open how the policy was to be characterised: **CAB 126-127 [93]**. But the Appellants' position on validity is wrong. Regulation 5 does not alter the "rent payable" under a determination, it authorises the CEOH to make the payment of a "rebate". It is also unclear how it would be in the Appellants' interests if reg 5 were invalid.

22 The determination was signed by the Minister on 22 December 2021 and was gazetted on 5 January 2022.

Gunbalanya (the community of Mr Badari, Ms Galaminda and Mr Nadjamerrek) and Laramba (the community of Ms Tilmouth).

14 During the Interim Period, "full rent" was fixed at the same amount as the maximum "full rent" that was payable for "new or rebuilt dwellings" under the Previous Framework: **CAB 125 [91]**. The brief to the Minister recorded that this was designed to "remove any ambiguity around the rent to be charged, particularly where historical records are of a poor and/or inconsistent standard".[23] During the Final Period, full rent was to be calculated at a fixed rate of $70 per room, up to $280 for a 4 bedroom house.

15 ***Second Determination*:** Following the commencement of the First Determination, a policy decision was made to delay the commencement of the Final Period until 5 September 2022.[24] To give effect to that decision, the Minister made the Second Determination in late-April 2022.[25] Its substantive effect was to continue the Interim Period until 4 September 2022, and delay the commencement of the Final Period until 5 September 2022. It also included six additional remote communities.

16 ***Third Determination*:** A further policy decision was to delay the commencement of the Final Period until 6 February 2023. Shortly before the Final Period was due to commence, in early September 2022, the Minister gave effect to that decision by making the Third Determination.[26] Its only substantive effect was to continue the Interim Period until 5 February 2023 and delay the commencement of the Final Period until 6 February 2023.

17 ***Rebates in Interim Period*:** During the Interim Period, the Rental Rebate Policy that was applicable under the Previous Framework continued to apply.[27] It was expected that the application of the old Rental Rebate Policy would cease upon the commencement of the Final Period, to be replaced by application of the new Safety Net Policy.[28] That is where the factual record stood at the time evidence closed at trial on 8 September 2022.

18 ***Fourth Determination*:** Shortly before the Final Period was due to commence on 6 February 2023, the Minister made the Fourth Determination.[29] That determination is the subject of the

[23] BAW-10 (**RBFM 166**).
[24] See BAW-12 (**RBFM 187**); BAW-13 (**RBFM 193**).
[25] The determination was signed by the Minister on 27 April 2022 and was gazetted on 29 April 2022.
[26] The Third Determination was gazetted on 2 September 2022.
[27] Third Warren Affidavit at [12]-[13] (**RBFM 359**).
[28] First Warren Affidavit at [28] (**RBFM 18**); Third Warren Affidavit at [4] (**RBFM 357**).
[29] The Fourth Determination was signed on 1 February 2023 and gazetted on 3 February 2023.

special leave application in D1/2025. However, the Court of Appeal received evidence of the Fourth Determination on the appeal relating to the First to Third Determinations.[30] It removed some communities from the scope of the determination (not the Appellants'), but otherwise did not affect the operation of the Third Determination. Accordingly, the Final Period commenced on 6 February 2023.

A.4 Position of the Appellants

19 The appeal is to be decided on the basis of the evidence as it stood at the conclusion of trial on 8 September 2022, supplemented only by the evidence concerning the commencement of the Fourth Determination. On that evidence, immediately before the First Determination:

10 19.1 Mr Badari and Ms Galaminda's full rent was $250 and they were receiving a rebate of $145, meaning their reduced rent was $105.[31] The full rent amount had been the same since at least December 2012, at which time the reduced rent amount was $123.[32] The rebate amount (and thus the reduced rent amount) fluctuated both up and down over time, reflecting the application of the Rental Rebate Policy being tied to household income.[33]

19.2 Mr Nadjamerrek's full rent was $175 and he was receiving a rebate of $76, meaning his reduced rent was $99.[34] The full rent amount had been the same since at least December 2012, at which time the reduced rent amount was $70.[35] Again, the rebate amount (and thus the reduced rent amount) fluctuated both up and down over time.[36]

20 19.3 Ms Tilmouth's full rent was $140.[37] The evidence does not reveal whether she was receiving a rebate, and so it is unknown whether she was paying reduced rent. However, it can be inferred that she would have received a rebate, and would have paid reduced rent, if she satisfied the Rent Rebate Policy (ie. if her full rent amount exceeded a maximum percentage of household income).

30 **CAB 409**, referring to First Clow Affidavit of 6 March 2023 (**RBFM 391-405**); *Supreme Court Act 1979* (NT), s 54.

31 BAW-35 (**RBFM 253**); BAW-36 (**RBFM 255**).

32 BAW-36 (**RBFM 270**).

33 For example, in December 2012, the rebate amount was $127; for a period in 2016, it was $170; for a period in 2019, it was $110: BAW-36 (**RBFM 269-270; 264-265; 259-260**).

34 BAW-43 (**RBFM 302**); BAW-44 (**RBFM 304**).

35 BAW-44 (**RBFM 319**).

36 For example, in December 2012, the rebate amount was $105; for a period in 2016, it was $70; for a period in 2018-2019, it was $14: BAW-44 (**RBFM 319; 314; 308-310**).

37 **ABFM 84-85**.

20 During the Interim Period:

20.1 On the most recent data in evidence, as at 24 July 2022, Mr Badari and Ms Galaminda's full rent remained $250 and they were receiving a rebate of $13, meaning their reduced rent was $237. Earlier in the Interim Period (including immediately after the First Determination commenced), they were continuing to receive a rebate of $145 meaning their reduced rate continued to be $105.[38]

20.2 On the most recent data in evidence, as at 24 July 2022, Mr Nadjamerrek's full rent remained at $175 and he was receiving a rebate of $72, meaning his reduced rent at that time was $103.[39] Earlier in the Interim Period (including immediately after the First Determination commenced), he was continuing to receive a rebate of $76 meaning his reduced rate continued to be $99.[40]

20.3 Ms Tilmouth's full rent increased to $230. The evidence does not reveal whether she was receiving a rebate, and so it is unknown whether she was paying reduced rent. However, it can be inferred that she would have received a rebate, and would have paid reduced rent, if she satisfied the Rent Rebate Policy.

21 At the time evidence closed before the primary judge, the Final Period had not commenced. Therefore, any factual inquiry about the Final Period made at that point in time was necessarily predictive. On the evidence at that time, once the Final Period commenced, it was understood that Appellants would be liable to pay the relevant full rent amount specified in the Third Determination. It was also specifically anticipated that Mr Nadjamerrek and Ms Tilmouth would have the Safety Net Policy applied to them, such that they would pay a reduced rent amount for at least an *initial* 6 month period.[41] But the Safety Net Policy was to intended to be applied universally, and so it could be anticipated that Mr Badari and Ms Galaminda would also benefit from the policy if it was applicable to their circumstances.[42] Of course, in the end, the Fourth Determination replaced the Third Determination before the Final Period commenced. So, the Appellants never became liable to pay the full rent amount under the

38 BAW-36 (**RBFM 255**). Cf Second Badari Affidavit at [2] (**ABFM 130**)
39 BAW-44 (**RBFM 304**). The agreement at Tab 11 of **ABFM** was never admitted into evidence.
40 BAW-44 (**RBFM 304**). Cf Second Nadjamerrek Affidavit at [3] (**ABFM 134**).
41 See First Warren Affidavit at [29] (**RBFM 18**).
42 See Warren XXN at T8, 13 (5 September 2022) (**RBFM 411, 416**).

Third Determination. And what they may or may not have paid under the Fourth Determination is irrelevant to this appeal.

22 Against that background, it is necessary to address several specific statements made by the Appellants.[43] *First*, the statement that Mr Badari and Ms Galaminda's joint rent was $81 per week (**AS [5]**) is not pertinent, because it was not the amount of either full or reduced rent for those Appellants at the time the First Determination was made. Rather, it is a reduced rent amount for those Appellants in 2016 (at a point when they were receiving a rebate of $169).[44] Immediately before the First Determination commenced, the reduced rent amount was $105 (reflecting a lower rebate of $145).[45]

23 *Second*, the statement that Mr Badari and Ms Galaminda's rent was purportedly raised by over 200% (from $81 to $280 per week) (**AS [19], [51]**) is inaccurate in three respects: (i) it uses an amount from 2016, not the time when the First Determination commenced; (ii) it compares a reduced rent amount with a full rent amount; and (iii) whether Mr Badari and Ms Galaminda, in fact, paid $280 after the commencement of the Final Period is unknown, but would have depended on whether the Safety Net Policy was applied to them. However, the effect of the Final Period commencing would have been to increase Mr Badari and Ms Galaminda's full rent from $250 to $280 (an increase of 12%).

24 *Third*, the statement that Mr Nadjamerrek's rent was purportedly raised by over 40% (from $99 to $140 per week) (**AS [19]**) is inaccurate in two respects: (i) it compares a reduced rent amount with a full rent amount; and (ii) whether Mr Nadjamerrek, in fact, paid $140 after the commencement of the Final Period is unknown, but would have depended on whether the Safety Net Policy was applied to him (which it was anticipated that it would).[46] However, the effect of the Final Period commencing would have been to reduce Mr Nadjamerrek's full rent from $175 to $140 (a *decrease* of 20%).

A.5 Sections 41 and 42 of the RT Act

25 It is also necessary to say something about that part of the Appellants' narrative that assumes that the making of the determinations under s 23 of the Housing Act had the effect of "removing the protections" under ss 41 and 42 of the RT Act: see **AS [9], [11(a)-(b)]**, **[13],**

[43] The correction and clarification of the statements then have consequences for several other statements: see **AS [19], [51]** (birthday present example); **[52]** (annual increase amounts); **[52]** (impact of the Interim Period on tenants in locations affected by the First Determination); **[53]** (comparison between $60 and $70).

[44] BAW-31 (**RBFM 233**).

[45] BAW-35 (**RBFM 253**).

[46] Based on the data about Mr Nadjamerrek's income, it was expected that application of the Safety Net Policy would mean his reduced rate would increase from $99 to $110.75 (an increase of 11.87%) (**RBFM 454-455**).

[14(a)], [15]. That reflects a misunderstanding of the relationship between the two schemes, and infects various of the Appellants' arguments: **AS [21], [29], [46], [60]**.

26 As to s 41, none of the tenancy agreements of the Appellants satisfied the condition in s 41(1): see **CAB 97-99 [47]-[51]**. The section thereby prevented the "landlord" increasing the rent payable under the Appellants' tenancy agreements (ie. the full rent). The exercise of the power under s 23 of the Housing Act did not "remove" that protection, because the protection was not absolute: s 41 did not mean the Appellants' "rent could not increase without each of their express, further agreement": cf **AS [9]**.[47] Rather, the scope of the power in s 23 of the Housing Act was not constrained by s 41 of the RT Act: **CAB 96-97 [44]-[46]**.[48] That meant the protection under s 41 of the RT Act was always subject to the contingency that the Minister may exercise the power in s 23 of the Housing Act.[49] Further, the Appellants were protected from their "landlord" increasing their rent by s 41 of the RT Act. But the Minister was not their "landlord".[50]

27 A similar analysis applies in relation to s 42. The NT Civil and Administrative Tribunal may, on the application of the tenant, declare that the "rent payable under a tenancy agreement is excessive": s 42(1). A tenant cannot apply to seek such a declaration where the rent payable has been determined under s 23 of the Housing Act: see **CAB 170-172 [161]-[163]**.[51] In essence, that is because rent will not be "payable under a tenancy agreement" but instead be payable under s 23(1) of the Housing Act.[52] For that reason, s 42 of the RT Act does not provide a "protective backstop" to the operation of a determination made under s 23 of the Housing Act: **CAB 181 [177]**. Rather, s 42 of the RT Act did no more than confer a right upon the Appellants to apply to the Tribunal, contingent on their rent being increased by their

47 Ms Tilmouth's agreement expressly recognised her rent was subject to a determination under s 23: **ABFM 85**.

48 Again, that conclusion of the Court of Appeal formed the basis for dismissing Ground 1 of the appeal in AP 13/22 (2237775), which is not the subject of this appeal: see **CAB 83-84 [26]**.

49 See, by analogy, *Yunupingu v Commonwealth* (2025) 99 ALJR 519 at [55]-[56] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [305] (Edelman J).

50 It was the CEOH "who granted the rights of occupancy to the appellants under the relevant tenancy agreements": **CAB 110 [65]**. The Court of Appeal rejected various arguments made by the Appellants that the Minister was the "landlord" for the purpose of s 41: **CAB 100-127 [52]-[95]**. That formed part of the basis for dismissing Ground 1 in AP 13/22 (2237775), which is not the subject of this appeal: see **CAB 83-84 [26]**.

51 That conclusion was reached by the Court of Appeal in dismissing an application for leave against a decision of the Tribunal (proceeding 2023-01346-SC). The Appellants did not seek special leave from that order.

52 See Housing Act, s 23(4), which states that the "rent to be paid for a dwelling" is the "rent to be determined from time to time under sub-section (1)" and the "rent to is to be paid despite anything to the contrary contained in the tenancy agreement". See also **CAB 177-178 [171]-[172]**.

"landlord" under their tenancy agreement: cf **AS [9]**; **[11(b)]**.[53] Of course, for the Appellants, that contingency could never occur because of the operation of s 41. In any event, the Appellants did not lose the protection of any "backstop" when the Minister exercised the power under s 23. Indeed, because their rent amounts were fixed by the determinations, for as long as they remained in force, their rent could not be increased by their "landlord".

PART V: ARGUMENT

B GROUND 1: PROCEDURAL FAIRNESS

28 In ***Kioa*** *v West*, Brennan J anticipated that, in cases such as this one, "[t]wo distinct but closely related questions" arise: "the first, or threshold, question is whether the exercise of the power is conditioned upon observance of the principles of natural justice; the second question, arising when the exercise of the power is so conditioned, is what the principles of natural justice require in the particular circumstances".[54]

29 The answer to the first of those questions is not in dispute: s 23 of the Housing Act is a power conditioned by the obligation to observe procedural fairness. However, because it informs the answer to the second question, we explain below why that is so: **Part B.1**.

30 The second question is the "critical question".[55] Before exercising the power, the Minister did not give any of the Appellants an opportunity to be heard. The issue is whether the obligation to observe procedural fairness required the Minister, in the circumstances, to provide such an opportunity (as the Appellants contend), or whether the obligation was "reduced to nothingness by the circumstances in which [the] power [was] exercised"[56] (as the Respondents contend): **Part B.2**.

B.1 The first question: is s 23 conditioned upon observing procedural fairness?

31 Whether the exercise of the power in s 23 is conditioned by an obligation of procedural fairness is a question of statutory construction.[57] Because the conferral of the power is not expressly subject to that condition, the answer to the question depends on whether the condition is implied. That is not a question that is necessarily "easily answered affirmatively": cf **AS [31]**. It requires consideration of two subsidiary inquiries: *first*, whether the presumption

53 The statutory context makes clear that the respondent to an application would be the "landlord": see RT Act, s 42(2)-(3), (5); **CAB 178 [173]**.

54 (1985) 159 CLR 550 at 612. See also **AS [30]-[33]**.

55 *Kioa* (1985) 159 CLR 550 at 585 (Mason J).

56 *Kioa* (1985) 159 CLR 550 at 616 (Brennan J).

57 ***Disorganized Developments*** *Pty Ltd v South Australia* (2023) 97 ALJR 575 at [32] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also ***S10****/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97] (Gummow, Hayne, Crennan and Bell JJ).

is **attracted** by the statutory power; and *second*, if attracted, whether the presumption has been **displaced**.

32 ***Attraction of the presumption:*** Where the exercise of a statutory power is "capable of having an adverse effect" on the "legally recognised rights or interests" of an individual,[58] it is presumed that the Parliament intended to confer the power on the "condition that the power is exercised in a manner that affords procedural fairness to that individual".[59] For that presumption to apply to a statutory power, two requirements must be satisfied.

33 The **first** requirement is that the exercise of the power must be "capable" of having an adverse effect on the "legally recognised rights or interests" of an individual.[60] However, satisfaction of the first requirement alone is not sufficient for the presumption to be attracted: the presumption is only "generally applicable"[61] to powers that satisfy that requirement. The **second** requirement is that the exercise of the power must be capable of affecting the rights or interests of the individual *as an individual*.[62] In other words, the exercise of the power must be apt to affect a person in their "individual capacity", as "distinct from as a member of the general public or of a class of the general public".[63] That will be the case where the exercise of the power affects the person "alone".[64] It will also be the case where the exercise of the power "singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests" of the general public (or a class of the general public) are affected.[65]

34 The rationale for the second requirement is instrumental. Where a power is capable of affecting the interests of an individual in their "individual capacity", "the repository of the power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power".[66] If, before exercising the power, the repository proposes to

58 *Disorganized Developments* (2023) 97 ALJR 575 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); ***CPCF*** *v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [367] (Gageler J).

59 *Minister for Immigration and Border Protection v* ***SZSSJ*** (2016) 259 CLR 180 at [75] (the Court).

60 An "individual" or "person" includes a "real or artificial person or entity": see ***Haoucher*** *v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652 (Deane J).

61 *Disorganized Developments* (2023) 97 ALJR 575 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ)

62 See *Disorganized Developments* (2023) 97 ALJR 575 at [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

63 *Kioa* (1985) 159 CLR 550 at 632 (Deane J); *Haoucher* (1990) 169 CLR 648 at 652 (Deane J), quoted in *Annetts v McCann* (1990) 170 CLR 596 at 607 (Brennan J); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366 (Deane J).

64 *Kioa* (1985) 159 CLR 550 at 619 (Brennan J).

65 *Kioa* (1985) 159 CLR 550 at 620, see also 619 (Brennan J.

66 See *Kioa* (1985) 159 CLR 550 at 619, see also 624 (Brennan J),

have regard to the interests of the individual (either because they must or choose to do so), the decision-maker will invariably be required to take into account "considerations that are personal to the individual".[67] In such a case, it is reasonable to suppose that the individual "could realistically" have something to say about those personal considerations.[68] Providing the individual with an opportunity to be heard about personal considerations reduces "the risk of the decision-maker reaching an unsound conclusion and thereby reduc[es]… the associated risks of injustice and inefficiency".[69] Where those risks are present, Parliament "may be presumed" to intend that the individual be heard before the power is exercised, so as to reduce those risks.[70]

35 The power in s 23 of the Housing Act meets both requirements. The power may be exercised to *increase* the "rent to be paid" for "a dwelling" (ie. a single dwelling). If the power were to be exercised in that way, it would satisfy the first requirement because it would adversely the "financial interests"[71] of the person who was liable to pay rent for that single dwelling. And it would satisfy the second requirement because it would affect the interests of the person "alone" and, therefore, in their "individual capacity".[72]

36 Of course, the breadth of the power in s 23 of the Housing Act means that it may be exercised in other ways. For example, the power may be exercised to *decrease* rent either for a single dwelling or a "class of dwelling". In that case, there would be no *adverse* effect on any person's financial interests.[73] The power may also be exercised to increase rent for a "class of dwelling". In that case, there would be an adverse effect on the financial interests of each person who was liable to pay rent for a dwelling within the class. Depending on the circumstances, the power may not have an adverse effect on each person in their individual capacity (as distinct from as a member of the class): cf **AS [36(b)]**.

67 ***FAI*** *Insurances Ltd v Winneke* (1982) 151 CLR 342 at 398 (Wilson J), cited in *Disorganized Developments* (2023) 97 ALJR 575 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). See also *Kioa* (1985) 159 CLR 550 at 586-587 (Mason J).

68 See ***Jarratt*** *v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [25], see also at [9] (Gleeson CJ).

69 See *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [51] (Gageler J).

70 See *Kioa* (1985) 159 CLR 550 at 624 (Brennan J). Compare *S10* (2012) 246 CLR 636 at [99](vi) (Gummow, Hayne, Crennan and Bell JJ), [114] (Heydon J).

71 Financial interests are "legally recognised" in the relevant sense: *FAI* (1982) 151 CLR 342 at 412 (Brennan J).

72 See also *Haoucher* (1990) 169 CLR 648 at 652 (Deane J). That aspect resembles the power to declare a "prescribed place" considered in *Disorganized Developments*, which could be exercised only in relation to "one place" and which the Court held attracted the common law presumption: (2023) 97 ALJR 575 at [10], [34]-[35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Criminal Law Consolidation Act 1935* (SA), s 83GA(2).

73 The Appellants are wrong to assume that such an exercise of power would be "inevitably adverse": **AS [29]**. That contention depends on their wrong understanding of the significance of ss 41 and 42 of the RT Act.

37 That the power may be exercised in different ways — with potentially different consequences for a person's financial interests and the capacity in which they are affected — does not affect the conclusion that the power conferred by s 23 of the Housing Act is conditioned on the obligation to afford procedural fairness.[74] Rather, as will become apparent, that is a matter that is significant as to what must be done to discharge the obligation in the particular circumstances of its exercise: cf **AS [34]**. The circumstances may mean that the obligation is more readily satisfied in some cases than in others, but the proposition that procedural fairness "may, in some cases, require less does not lead to the conclusion that none is intended to be provided".[75]

38 That understanding of s 23 of the Housing Act is consistent with the Spigelman CJ's reasoning in ***Vanmeld*** *Pty Ltd v Fairfield City Council* concerning s 68(3) of *Environmental Planning and Assessment Act 1979* (NSW). That provision conferred upon councils the power to amend a draft local environment plan,[76] which could be exercised in relation to an amendment that applied to "significant numbers of landowners" but could also be exercised to an amendment that applied to "only a single landowner". For his Honour, where a power has that type of differential operation, it "suggests that the issue is not whether an obligation to afford procedural fairness exists at all, but what is the content of such an obligation in a specific context".[77]

39 In turn, Spigelman CJ's reasoning is consistent with Brennan J's analysis in *Kioa*. As Brennan J explained, once it is concluded that a power is conditioned by procedural fairness, "*every* exercise of the power" must comply with that condition.[78] That is because "whether a statutory power is conditioned on the observance of the principles of natural justice demands a *universal* answer for it is a question of construction".[79] But that does not mean that every exercise of the power is conditioned by a *universal procedure*. To the contrary, "[i]t is not possible precisely

74 See *Jarratt* (2005) 224 CLR 44 at [25] (Gleeson CJ).

75 ***Saeed*** *v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [47] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Jarratt* (2005) 224 CLR 44 at [25] (Gleeson CJ); ***Day*** *v Harness Racing (NSW)* (2014) 88 NSWLR 594 at [105]-[114] (Leeming JA).

76 See *Vanmeld* (1999) 46 NSWLR 78 at [24], [55] (Spigelman CJ).

77 *Vanmeld* (1999) 46 NSWLR 78 at [62] (Spigelman CJ). See also *Brisbane City Council v Leahy* (2023) 15 QR 101 at [38], [40] (Flanagan JA).

78 *Kioa* (1985) 159 CLR 550 at 611 (emphasis added).

79 *Kioa* (1985) 159 CLR 550 at 611 (Brennan J).

and exhaustively to state what the repository of a statutory power must always do to satisfy a condition that the principles of natural justice be observed".[80]

40 ***No displacement:*** Because of its nature as a common law presumption, the presumption of procedural fairness is subject to statutory displacement. The presumption is "strong" because procedural fairness is a "fundamental principle" and, therefore, it is assumed that Parliament would not "overthrow" that principle "without expressing its intention with irresistible clearness".[81] That requires "express words or necessary implication".[82] The Housing Act contains neither and therefore it did not "clearly displace" the common law presumption. So much was accepted by the Court of Appeal: **CAB 147-148 [123]**.

B.2 Second question: what did procedural fairness require in the circumstances?

41 ***The content of procedural fairness is variable:*** An obligation to afford "procedural fairness" conveys nothing more or less than the notion of a "flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case".[83] As we have said above, there is "no package of procedural rules which must always be observed".[84] Even in the judicial context, the obligation has no "minimum requirement".[85] Instead, "[w]here the obligation exists, its precise content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case".[86] And because the content of the obligation is variable depending on the circumstances of the particular case, "regard must be had to the circumstances of the particular case to ascertain what is needed to satisfy the condition".[87]

42 Stated generally, a decision-maker will satisfy "the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised".[88] What is a reasonable procedure may vary widely. As Deane J observed in *Haoucher*:[89]

80 *Kioa* (1985) 159 CLR 550 at 611 (Brennan J), see also at 585 (Mason J).
81 *Saeed* (2010) 241 CLR 252 at [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
82 *Disorganized Developments* (2023) 97 ALJR 575 at [28], [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
83 *Kioa* (1985) 159 CLR 550 at 585 (Mason J), see also 563 (Gibbs CJ), 611 (Brennan J), 633 (Deane J).
84 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [85] (Allsop CJ, Middleton and Foster JJ)
85 See *SDCV v Director-General of Security* (2022) 277 CLR 241 at [53]-[54] (Kiefel CJ, Keane and Gleeson JJ).
86 *Haoucher* (1990) 169 CLR 648 at 652 (Deane J).
87 *Kioa* (1985) 159 CLR 550 at 611 (Brennan J).
88 *Kioa* (1985) 159 CLR 550 at 627 (Brennan J), quoted in *Minister for Immigration and Border Protection* (2015) 256 CLR 326 at [53] (Gageler and Gordon JJ).
89 *Haoucher* (1990) 169 CLR 648 at 652-653 (Deane J).

> In some cases where the requirements of procedural fairness are applicable, nothing less than a full and unbiased hearing of each affected individual's case will satisfy them. In other circumstances, something less may suffice. Thus, the circumstances of a particular case may be such that procedural fairness does not require that each person affected be accorded an effective opportunity of being personally heard before a decision is made …

43 Gageler J made the same point in *CPCF*:[90]

> Procedural fairness as implied in some contexts can have a flexible, chameleon-like, content capable of varying according to the exigencies of the exercise of power between nothingness at one extreme and a full-blown trial at the other. To imply procedural fairness as a condition of the lawful exercise of a statutory power is therefore not necessarily to require a hearing in every case in which the power might be exercised. Ordinarily, procedural fairness does not require providing a person whose interests are likely to be affected by an exercise of statutory power any greater opportunity to be heard than is reasonable in all the circumstances.

44 Those observations make plain that there is no necessary tension between a conclusion that a power is conditioned by an obligation to afford procedural fairness and a conclusion that, in the circumstances of a particular case, that obligation may be discharged without an individual being provided with an opportunity to be heard: cf **AS [37], [43]**. *Kioa* illustrates that point. The Court there held that the deportation power was conditioned by an obligation to afford procedural fairness, but also recognised that there may be circumstances in which that condition could be satisfied without providing the person to be deported with any opportunity to be heard.[91] That analysis reflects the proposition that "the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised".[92] The Court of Appeal correctly recognised that same point when their Honours observed that "[i]t does not follow that because the exercise of a power is conditioned in a general sense by a requirement for procedural fairness that some form of hearing is always required": **CAB 147 [122]**.

45 ***The power in s 23:*** The statutory context will necessarily bear upon what is a "reasonable" procedure to be adopted in the circumstances of a particular case.[93] For some statutory powers, the nature of the power will mean that it is possible to describe, in general terms, how the obligation might be discharged in the ordinary run of cases in which it falls to be exercised. Section 23 is not a power of that kind. There are two critical matters.

[90] (2015) 255 CLR 514 at [367]. See also *Kioa* (1985) 159 CLR 550 at 615-616 (Brennan J).
[91] See *Kioa* (1985) 159 CLR 550 at 586 (Mason J), 616, 624 (Brennan J), 633 (Deane J).
[92] *Kioa* (1985) 159 CLR 550 at 611 (Brennan J).
[93] See *Kioa* (1985) 159 CLR 550 at 584-585 (Mason J), 633 (Deane J).

46 *First*, as explained in paragraph 36 above, the power can be exercised in a variety of different ways, with different consequences for the financial interests of individuals (including the capacity in which they may be affected). *Second*, s 23 contains "no positive indication of the considerations" that may be taken into account by the Minister in exercising the power.[94] Those considerations are therefore "unconfined", except "in so far as they may be found in the subject-matter, scope and purpose of the statue some implied limitations on the factors to which the decision-maker may legitimately have regard".[95] In essence, the Minister is required to make a "discretionary value judgment" by reference to "undefined factual matters", akin to what is required where a "public interest" criterion is used expressly.[96] That reflects the purpose underlying s 23, which "was to vest the responsible Minister with what was described in the course of the parliamentary debates as 'complete discretionary powers in the matter of rental determination'": **CAB 174-175 [167]**; cf **AS [28]**.

47 Where both the way in which the power is to be exercised and the considerations that may be taken into account are discretionary, the assessment of what constitutes a "reasonable" procedure ought to be made by reference to how and why the Minister *actually* proposes to exercise the power.[97] As Brennan J put it in *Kioa*, "[t]he repository must adopt a fair procedure having regard to the matters he [or she] is bound to take into account and … the matters he [or she] *proposes* to take into account".[98] On that approach, a "reasonable" procedure in the circumstances of a particular case will depend on: (i) whether the power is to be exercised for a single dwelling or a class of dwelling (and whether that exercise would increase or decrease rent); and (ii) the considerations that the Minister is proposing to take into account in making their "discretionary value judgment".

48 At one end of the spectrum would be a case where the Minister is proposing to exercise the power to increase rent for a single dwelling, based (at least in part) upon considerations

94 *Water Conservation and Irrigation Commission NSW v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

95 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40 (Mason J). Where, as here, the decision is made by a Minister, "due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion": at 42.

96 See *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *S10* (2012) 246 CLR 363 at [99(iv)-(v)] (Gummow, Hayne, Crennan and Bell JJ), [113]-[114] (Heydon J).

97 See Aronson, Groves and Weeks, ***Judicial Review of Administrative Action*** *and Government Liability* (7th ed, 2022) at 431-435 [8.120], 438-439 [8.130] (the "actual consideration" approach).

98 *Kioa* (1985) 159 CLR 550 at 628 (emphasis added); see also 586-587 (Mason J); *South Australia v* ***O'Shea*** (1987) 163 CLR 378 at 409, 412 (Brennan J); ***Castle*** *v Director-General, State Emergency Services* [2008] NSWCA 231 at [8]-[9] (Basten JA).

specific to that dwelling or its tenants. In such a case, it would be reasonable for the Minister to follow a procedure involving the provision of "reasonable notice" to the person liable to pay the increased rent, "to give them an opportunity to supply information or make submissions as to matters within their knowledge … that may be relevant" to whether rent should be increased.[99] Consistent with part of the underlying rationale for the presumption attaching to the power in the first place, affording that opportunity would reflect the practical reality that, in circumstances where the Minister is proposing to take into account considerations specific to a single dwelling, the person liable to pay rent could realistically supply information or make submissions about those matters.

49 At the other end of the spectrum is a case such as the present, where the Minister proposed to (and then did) exercise the power by reference to four different "classes of dwelling", with each class consisting of a large number of people. "As at the time of trial, there were 5433 dwellings subject to the Determinations. Many of those dwellings had multiple tenants, each with a separate legal obligation to pay rent": **CAB 149 [127]**. There is no evidence that, on any of the three occasions the Minister exercised the power, the Minister was proposing to take (or in fact took) into account any considerations that were personal to any of the individuals liable to pay rent for any of those 5433 dwellings.

50 To the contrary, the First Determination was made to give legal effect to one of the core components of the New Framework policy that had been approved by Cabinet, following a four-year development process that was initiated at Cabinet's request.[100] The involvement of Cabinet in that process was entirely orthodox and expected, given "any determination of rent levels for a large class of tenancies under a social housing program is one overlaid by public finance and political considerations" and that, in the circumstances, what was ultimately involved was a "policy shift from an income-based rent model to a dwelling-based operational cost model for remote communities and town camps, affecting more than 5000 dwellings": **CAB 150-151 [128]**. The later determinations made adjustments to the First Determination (as to timing of commencement of the Final Period and the number of communities), but none of those adjustments was made by reference to any individual. Thus, the Court of Appeal was correct to say that the determinations "were fixed by reference to matters of public policy

[99] See *Disorganized Developments* (2023) 97 ALJR 575 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[100] See Ministerial Briefing: BAW-10 (**RBFM 166-167**). See also *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 637 (Gummow J).

rather than considerations personal to either the appellants or to the general class of which they formed part": **CAB 151 [129]**. That was a permissible approach for the Minister to take, given the discretionary value judgment involved in the exercise of the power.[101]

51 That permissible approach — involving an *exclusive* focus on "high level general policy"[102] — means that a "reasonable" procedure in the circumstances extended to not providing any of the Appellants (or any other individual person liable to pay rent under a determination) any form of opportunity to be heard before the making of that determination.[103] That accords with Brennan J's view in *O'Shea* that, a Minister is "not bound to hear an individual before *formulating or applying a general policy* or exercising a discretion in the particular case *by reference to the interests of the general public*, even when the decision affects the individual's interests".[104] That is because once a court "reach[es] the area of ministerial policy giving effect to the public interest, we enter the political field" and, in that field, a Minister "may determine general policy or the interests of the general public free of procedural constraints".[105]

52 All of that is consistent with the underlying rationale for the presumption attaching only where a person's interests are affected in their "individual capacity": see paragraph 34 above. Where a decision-maker (permissibly) proposes to exercise a power exclusively by reference to matters of "high level general policy" and not any matters personal to an individual, there is no reason to consider that the individual "could realistically" provide any information about those matters.[106] Indeed, in such cases, it would be "positively unfair to encourage" the individual "to think that anything could be gained by [them] making representations".[107] The Appellants' suggestion that they could have made submissions "explaining that bedrooms were not an accurate proxy for amenity or value" or making a case for the non-application of the policy to a particular community only serves to illustrate the correctness of that general

[101] It has never been suggested that any person's particular circumstances constitute mandatory relevant considerations. Cf *Disorganized Developments* (2023) 97 ALJR 575, where "the proper exercise of the declaration power **require[d]** the identification of facts to connect the proposed prescribed place with the purpose of disruption": see at [43]-[44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) (our emphasis).

[102] Compare *O'Shea* (1987) 163 CLR 378 at 389 (Mason CJ), 409-410 (Brennan J). See also *Disorganized Developments* (2023) 97 ALJR 575 at [39]-[40] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[103] See further *Judicial Review of Administrative Action* at 438-439 [8.130].

[104] *O'Shea* (1987) 163 CLR 378 at 411 (emphasis added). See also *Disorganized Developments* (2023) 97 ALJR 575 at [60] (Steward J); *Beechworth Shire v Attorney-General (Vic)* [1991] 1 VR 325 at 332 (Vincent J); ***Castle*** [2008] NSWCA 231 at [7] (Basten JA).

[105] *O'Shea* (1987) 163 CLR 378 at 411 (Brennan J).

[106] Cf *Kioa* (1985) 159 CLR 550 at 633 (Deane J).

[107] *FAI* (1982) 151 CLR 342 at 398 (Wilson J).

understanding: **AS [45]**. Neither of those matters are "personal" to any of the Appellants in the relevant sense, but are matters of general high-level policy affecting them as members of a class of the general public.[108]

53 ***Conclusion on second question:*** Because the power was conditioned by procedural fairness, on each of the three occasions that the Minister exercised the power, she was obliged to comply with the obligation to afford procedural fairness. However, in the particular circumstances, it was reasonable for the Minister to proceed without providing the Appellants any opportunity to be heard. There was therefore no breach of the obligation of procedural fairness. Alternatively, if there was a breach, the Appellants have not sought to discharge their onus of establishing the Minister's exercise of the power "could realistically" have been different.[109] In any event, they cannot do so: for the same reasons outlined at paragraphs 50 to 51 above, it "can be affirmatively concluded that the outcome would inevitably have been the same".[110] Ground 1 should be dismissed.

C GROUND 2: UNREASONABLNESS

54 It is an implied condition of the power in s 23 of the Housing Act that it be exercised within the bounds of reasonableness.[111] The Appellants bear the onus of establishing the Minister's exercises of that power were "unreasonable", in that they lacked an "evident and intelligible justification".[112] Usually, and in this case, that is a high threshold.[113]

55 The justification here is both evident and intelligible, revealed by the course of events summarised at paragraphs 8 to 18 above. In short, the Cabinet requested that the existing policy framework be reformed; after a multi-year policy development process, a new policy framework was approved by Cabinet; that framework involved the adoption of an "operational cost per bedroom" model (the contours of which had been approved by SAG), coupled with a "safety net" to temper any overly harsh consequences of that model. In those "*particular*

[108] See also *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537 at 555 (Lehane J). They are, in that way, analogous to the "more general submissions as to the likely efficacy of the declaration power in disrupting serious criminal activity" referred to in *Disorganized Developments*, in respect of which procedural fairness did not require an opportunity to be heard: (2023) 97 ALJR 575 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[109] ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[110] *LPDT* (2024) 98 ALJR 610 at [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[111] *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541 at [80] (Nettle and Gordon JJ).

[112] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at [20] (Kiefel CJ, Bell, Gageler and Keane JJ).

[113] See *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at [26] (the Court).

factual circumstances" (**AS [48]**),[114] the Minister exercised the power to give legal effect to one component of that policy framework. None of the six matters identified by the Appellants undermine that justification.

56 The *first* complaint is directed to the adoption of an "operational cost per bedroom model", as opposed to a different type of model: **AS [49]-[50]**. But that was the model preferred by SAG, including over that which accounted for proximity to amenities.

57 The *second* complaint is that the "operational cost" model should have been extended to even more communities: **AS [51]**. It is possible that, in some cases, "under-inclusiveness" might be a factor in demonstrating unreasonableness; but there is insufficient evidence to draw any conclusion that there was under-inclusiveness to such a great extent it deprived the determinations of their otherwise evident and intelligible justification.

58 The *third* and *fourth* complaints allege that the determinations did not impose an "operational cost" model and that the amount per bedroom was irrational: cf **AS [52]-[53]**. For the Final Period, the $70 per bedroom cost was proximate to both the *reduced* operational cost (approximately $60) and the *actual* operational cost (approximately $80) that was estimated in 2018. That the Minister chose a figure between those two amounts over 3 years later, in a context where a "safety net" was also to be introduced (that was not part of the SAG model), only tends to support the evident and intelligible justification. Similarly, the amounts for the Interim Period were referable to the existing maximum cost policy and the continuation of the existing rebate policy.

59 The *fifth* complaint is that SAG was not involved in finalising the detail of the policy, and that Cabinet was not involved in the adjustments made by the Second and Third Determinations: **AS [55]**. It is difficult to understand how that undermines the evident and intelligible justification revealed by the matters that they were involved with.

60 The *sixth* complaint involves an assertion of "unfairness" (not in procedure but in outcome) and "harshness": **AS [56]**; also **AS [60]**. A large part of that complaint depends on the misunderstanding of ss 41 and 42 of the RT Act: see paragraphs 25 to 27 above. It is otherwise a complaint about the merits of the decision.

[114] *SZVFW* (2018) 264 CLR 541 at [84] (Nettle and Gordon JJ).

PART VII: ESTIMATE OF TIME

61 The respondent will require 2.5 hours to present oral submissions.

Dated: 17 July 2025

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

ASHER BADARI
First Appellant

RICANE GALAMINDA
Second Appellant

LOFTY NADJAMERREK
Third Appellant

CARMELENA TILMOUTH
Fourth Appellant

and

MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING
First Respondent

MINISTER FOR HOUSING AND HOMELANDS
Second Respondent

ANNEXURE TO THE RESPONDENTS' SUBMISSIONS (FIRST TO THIRD DETERMINATIONS)

No.	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	*Housing Act 1982* (NT)	As in force between 1 July 2021 and 1 May 2023	s 23	Version in force at the time each determination was made and Gazetted.	First Determination: 23 December 2021 (made) 5 January 2022 (Gazetted) Second Determination: 27 April 2021 (made) 29 April 2022 (Gazetted) Third Determination: 2 September 2022 (made and Gazetted) Fourth Determination: 1 February 2023 (made) 3 February 2022 (Gazetted)
2	*Housing Regulations 1983* (NT)	As in force between 18 July 2016 and 30 April 2023	rr 4, 5	As above	As above
3	*Residential Tenancies Act*	As in force between 1	ss 41, 42	As above	As above

	1999 (NT)	April 2021 and 2 January 2024			
4	*Environmental Planning and Assessment Act 1979* (NSW)	Reprint 2 April 1991 (subject to update sheet of 1 January 1993)	s 68(3)	Version considered in *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78	15 June 1993
5	*Criminal Law Consolidation Act 1935* (SA)	As in force between 1 October 2020 and 31 January 2021	s 83GA(2)	Version considered in *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575	17 December 2020 (date the "Cowirra Regulations" were made)